UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2601

September Term, 2000

KRAUS JOINT VENTURE

v.

HARFORD COUNTY, MARYLAND

Kenney
Rodowsky, Lawrence F.
(retired, specially assigned),
Thieme, Raymond G., Jr.
(retired, specially assigned),

JJ.

Opinion by Rodowsky, J.

Filed: December 14, 2001

#12C99002059

The County Council of Harford County, Maryland, sitting as a Board of Appeals (the Council), determined that the appellant, Kraus Joint Venture (Kraus), was not entitled to nonconforming use status for the subject property. Because there was substantial evidence to support the Council's conclusion, we shall affirm.

The subject property (the Property) consists of 10.03 acres known as 1233 Joppa Farm Road. It is irregularly shaped. Its southwesterly and southern sides face Joppa Farm Road and its western side abuts the east side of Philadelphia Road. Those two roads intersect a short distance west of the Property.

Under the original zoning of December 1957 in Harford County the Property was zoned agricultural. Prior to 1957 and for some time thereafter, the Property was owned by the parents of Donald J. Conklin (Conklin). Conklin was a mechanic or electrician whose full-time employment was shift work for Bethlehem Steel. One witness thought Conklin was a person who "more or less ... did side work, side jobs."[1] Another witness described him as a person who "liked to fiddle around; and when things broke down he just piled it on the side."

In July 1964 Conklin applied to the then Board of Appeals for permission to "use [on the Property] a new private non-commercial utility building as a contractor's equipment storage garage. 'B-3' use per Sec. 13.0115 in an 'A-1' Dist." The relevant use in a B-3

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[1]The witness who so testified had no personal knowledge of any side job that Conklin did.

zone was for "[c]ontractor's equipment storage, yard or plant, or storage and rental of equipment commonly used by the contractor."

The Board of Appeals granted the application, based on the following findings and conclusions:

> "That appellant's application for a Zoning Certificate for the conversion of a private non-commercial utility building into a contractors equipment storage building was disapproved by the Zoning Inspector and appealed because the use is first permitted in a B-3 General Business District per Section 13.0115. Appellant's property consists of about 10 acres in an A-1 Agricultural District. Appellant does some of [*sic*] earthmoving and contracting work. He has a backhoe, bulldozer, and lowboy to haul the equipment on. He has been using an automobile garage as a place where he can work on his equipment. He is taking that down and wants to put up a 24' x 32' utility building for storage and repair work. The work that he does is on property belonging to others and none of it is done on this property. This property which belongs to his parents is used only for storage and repair work. Also appellant does all of his own work and does not hire outside help. He is regularly employed and does this work after hours and on weekends.
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> "After hearing the testimony and reviewing the facts, the Board felt that this is an authorized accessory use under Section 7.03 of the Ordinance. Since no work except repair work is done on the premises and no outside help is used, and since the property is only used for storage and repairs, the proposed building could be considered as similar to a private garage and the use would not be considered a business use on these premises.
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> "The Zoning Inspector is therefore ordered to issue a Zoning Certificate for the construction of the utility building to be 24' x 32' and the Zoning Certificate shall be valid so long as the building is used in the non-commercial manner outlined above."

The utility building appears on its exterior to be a two-bay garage. It was erected approximately 200 feet south of an existing

dwelling house on the Property. The utility building/garage is set back approximately 125 feet from Joppa Farm Road.

Kraus purchased the Property at public auction on December 1, 1989, without checking the zoning.[2] A principal of the purchaser is Leonard Kraus, Sr. (Mr. Kraus). Immediately after the purchase Mr. Kraus's brother-in-law and nephew-in-law rented the utility building and the area around it for their excavating business, Dilworth Trucking (Dilworth). The dwelling on the Property is rented to third parties and is not involved in this proceeding. The arrangement between Kraus and Dilworth is informal. There is no written lease. Over the years the arrangement has involved many indulgences by Kraus in the nonpayment by Dilworth of a rent which is not specified in the record.

By a comprehensive rezoning sometime in the 1970s the Property was zoned R1 Residential.

In April 1997 a zoning inspector visited the Property, apparently in response to one or more complaints from neighbors. As described in the notice to Kraus, that inspector observed:

> "--the storage of multiple untagged and inoperative motor vehicles, both commercial and non-commercial;
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> "--the establishment of a fenced storage yard, approximately 120' x 180', without benefit of a permit for the fence or zoning approval (the fenced area does not appear in the 1990 aerial photographs);

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[2]After the sale Conklin moved to Florida. He did not testify at the hearing in this case, and his availability is unknown.

"--the storage of used oil in 5-gallon buckets;

"--the conversion of the existing building into office space;

"--a new road being installed from the dwelling ... to the area where the office building is located;

"--a filling operation which is taking place along the streambed;

"--the outside storage of used tires, construction debris, etc.;

"--the storage of junked motor vehicles, dump trucks, in back of the fenced area[;]

"--the placement of several large storage containers or trailers without zoning approval and permits."

Kraus took the position that the Property enjoyed nonconforming use status dating back to its use by Conklin. That contention was questioned by the Zoning Enforcement Coordinator who requested proof "that the use commenced prior to [December] 1997 and has continued uninterruptedly since that time."

At that time the matter was resolved by a letter agreement between Kraus and the Zoning Enforcement Coordinator. Dilworth, and a concrete company that also was doing business on the Property, would "be moving from the site in the near future." The Property would be cleaned up, and "the office partition in the garage structure [would be restored] to its original condition."

The cement company vacated the Property, but Dilworth did not. Enforcement of the alleged zoning violation, however, was held in abeyance while the parties to this action debated the merits of the

nonconforming use claim. A zoning inspector visited the Property on August 14, 1997, where he photographed two parked Dilworth dump trucks.

In November 1997 Kraus requested a ruling from the Director of the Department of Planning and Zoning that it possessed a

> "valid nonconforming use at [the Property] to operate an excavating business or similar type business, such as trucking or truck storage within the limits, as well as storage and repair of equipment and motor vehicles associated with business activities. The work to be performed is done at the premises of other persons."

The Director ruled on January 16, 1998, pursuant to § 267-7 of the Harford County Zoning Code, that the Property did not enjoy the status of a nonconforming use as described. That ruling was based in part on the fact that aerial photographs taken in 1957 reflected that "neither the dwelling nor the utility building were on the [P]roperty at that time." Kraus appealed to the Council.

While the appeal was pending Harford County zoning authorities again inspected the Property in late July or early August 1998. That inspection confirmed that it was still occupied by Dilworth. As described in a letter of August 3, 1998, from the Zoning Enforcement Coordinator to Kraus's attorney, the inspector's observations of Dilworth's activities on the Property included the following:

"--a Kenworth dump truck and lowboy trailer;

"--a large container storage box;

"--snow plows;

"--fuel tanks and a dumpster;

"--piles of top soil, sand, gravel, and logs;

"--a skid loader;

"--a dump truck body;

"--a front-end loader;

"--a Ford utility truck;

"--an untagged and/or inoperable blue Bronco;

"--a cargo storage trailer on a lowboy trailer;

"--a large area utilized for the outside storage of used tires, vehicle parts, and miscellaneous junk and debris[.]"

In December 1998 an examiner conducted the hearing for the Council. No one from Dilworth testified. The current use of the Property by Dilworth was described by Mr. Kraus. Our description of that use is based on the evidence of Mr. Kraus that is most favorable to Harford County, as the prevailing party. Mr. Kraus acknowledged on cross-examination that Dilworth stored on the Property four ten-wheel dump trucks, two lowboys, a container and some machinery, two backhoes, two bulldozers, and some 100 to 150 gallon fuel oil storage tanks. There were also three pickup trucks which may have been employees' personal vehicles. Mr. Kraus estimated the area used by Dilworth, including the fenced enclosure behind the utility building, to be 150 feet by 250 feet.[3] In

[3]This estimate does not include all of the ingress and egress (continued...)

addition, Dilworth had graded a parking lot in the area used by it.[4]

Kraus called a number of witnesses in an effort to prove the use made of the Property by Conklin in 1957 and thereafter. Gerald Scott, who has lived approximately one mile to one and one-half miles from the Property for fifty-two years, observed contractor's equipment parked on the Property, but he did not know if a business was conducted there. Patrick O'Keefe described the Property as it appeared in the period 1955-1960. He recalled "trucks and some broken-down bulldozers." He did not know whether the trucks had motor vehicle license tags. Richard Rutkowski has lived approximately two miles from the Property since 1941, and he hunted near the Property in the late 1940s. He observed construction equipment sitting on the Property, but he never saw the equipment moving up or down the road.

The only witness to testify that Conklin had done construction work for compensation was Ray Duvall who lived on Philadelphia Road near Joppa Farm Road from approximately 1965 to 1990. He testified that Conklin had "a couple dump trucks" and two bulldozers, one of which was inoperable because it had no treads. On one occasion,

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[3](...continued)
area from Joppa Farm Road.

[4]Current color photographs show the earth between Joppa Farm Road and the utility building to be cleared, level, and apparently surfaced at one time with gravel.

the time of which Duvall did not specify, Conklin drove the operable bulldozer to Duvall's house and cleared out some trees, for which Duvall paid Conklin.

There was also evidence that Conklin used his operable bulldozer to clear a roadway from Philadelphia Road to his own house and that he created a fishing pond on the Property.

Considerable testimony described the poor to derelict condition of Conklin's construction equipment. A witness who was called by Kraus and who since 1968 lived directly across Philadelphia Road from the Property described Conklin's construction equipment as "rusted up and all." The Property was "a little bit of both" an equipment storage area and a junk yard. It was "equipment that [Conklin] no longer used and it just deteriorated[.]" One of the protesting neighbors, a resident since 1953 in a home that abuts the eastern end of the Property, never saw Conklin's equipment move and described it as "museum pieces."

The examiner found that "[m]any of the witnesses who testified were less than precise in their recollection of the extent and identity of equipment used." Nevertheless, the examiner found "[a]t least two sources [that] appear significant in establishing the uses which existed on the [Property] in 1957." These were the testimony of Mr. Osid Jackson (Jackson) and the decision of the Board of Appeals in 1964.

Jackson had helped "Mr. Conklin" to move onto the Property in the 1940s. The examiner found that Jackson "clearly recalled that the [P]roperty was never used for a business[.]" According to the examiner, Jackson said that Conklin "had a dump truck, perhaps two dump trucks, a low-boy, and a front-end loader, none of which ever moved, and a bulldozer."[5] Emphasizing the significance of this testimony, the examiner said that Jackson "was very certain in his testimony that the vehicles were never operable for the entire time they existed on the [P]roperty, with the exception of the one bulldozer which Mr. Conklin drove around the [P]roperty."

Also significant to the examiner was that, by 1964, Conklin stored only a backhoe, a bulldozer, and a low-boy on the Property, as evidenced by Conklin's application to the Board of Appeals to erect the utility building. The examiner concluded that, "in 1957, at best, there were two dump trucks, a backhoe, a bulldozer/front-end loader ... and possibly a lowboy ... stored on the [P]roperty."

Comparing Conklin's use with Dilworth's use, the examiner concluded that there was an illegal extension of the nonconforming use.[6] That official found that Dilworth's use was "an active

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[5]Actually, Jackson specifically denied that Conklin ever had a lowboy and affirmatively testified that Conklin "had no means of transporting equipment to a jobsite."

[6]Throughout the proceedings Harford County has chosen to characterize Conklin's storage of equipment on the Property as a nonconforming use, although the Board of Appeals in 1964 predicated its approval of the erection of the utility building on the theory

(continued...)

trucking operation with numerous tandem-axle dump trucks, a variety of associated equipment, a large fenced-in parking area, and the use of the old garage for its business purposes." This use, the hearing officer concluded, "greatly exceeds the relatively minor, non-intrusive, and personal use of the [P]roperty as it was under Mr. Conklin's ownership."[7] Accordingly, the hearing examiner recommended to the Council that the Director's ruling of January 16, 1998, be upheld.

The Council adopted the recommendation and concluded that the Property did not enjoy nonconforming use status to the extent

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[6](...continued)
that it was ancillary to the agricultural use of the Property. Inasmuch as all parties have treated the issue before us to be whether Conklin's nonconforming use was illegally extended by Dilworth, we shall do the same.

[7]The examiner also found that, pursuant to § 267-20(C) of the Harford County Zoning Code, there had been an abandonment of the nonconforming use. That section provides:

> "In the event a non-conforming use ceases for a period of one year or more, then the non-conforming use shall be deemed abandoned and compliance with this Part I shall be required. The casual, temporary or illegal use of land or structure does not establish the existence of a non-conforming use."

The examiner's finding was not that Kraus failed to prove a pre-December 1, 1957 contractor's equipment storage use of the Property by Conklin, or that there had been a hiatus of at least one year in that use during Conklin's ownership. The abandonment theory of the decision is that Dilworth's use was a "substituted and expanded" use which terminated the Conklin use and constituted a zoning violation which, under § 267-20(C), could not give rise to a different nonconforming use. This analysis seems to be part of the resolution of the issue whether the nonconforming use was extended by Dilworth and not to present a separate ground of decision.

requested. The Council added, however, that "[a] resident is allowed to keep on the [P]roperty three (3) pieces of personal use equipment similar to a backhoe, bulldozer, or low-boy trailer ... for non-commercial activity on-site and for work performed off-site." Kraus sought judicial review in the Circuit Court for Harford County which affirmed the decision of the Council. Appeal by Kraus to this Court followed.

In this Court Kraus argues that, as a matter of law, the evidence most favorable to the decision of the Council describes a mere intensification of the 1957 use of the Property, and not an illegal extension. Specifically, Kraus notes that Conklin stored contractor's equipment on the Property and submits that this is all that Dilworth is doing. Kraus notes that less than one acre of the Property is used for the Dilworth operation (Mr. Kraus's estimate of 150 feet by 250 feet), which is less than one-tenth of the entire property. The actual work is not performed on the Property. Although the storage of equipment for a contracting business is inconsistent with the Property's zoning, that was the activity engaged in by Conklin, as evidenced by the 1964 order of the Board of Appeals. Addressing the increase in the number of pieces of construction equipment between the Conklin use and the Dilworth use, Kraus takes as his starting point the testimony of Jackson, which was accepted by the examiner, and Kraus says that Conklin had five pieces of heavy equipment, "[a] bulldozer, a front-end loader,

a backhoe, and the dump trucks." Brief of Appellant at 11. Kraus submits that the increase in the amount of equipment under the Dilworth use falls within the tolerances for a legal intensification of use as illustrated in Maryland by *Nyburg v. Solmson*, 205 Md. 150, 106 A.2d 483 (1954); *Jahnigan v. Staley*, 245 Md. 130, 225 A.2d 277 (1967), and *Feldstein v. LaVale Zoning Bd.*, 246 Md. 204, 227 A.2d 731 (1967).

The continuation of a nonconforming use is not established by the lowest common denominator between two uses, that is, the commonality that Conklin used, and Dilworth uses, some portion of the Property for the storage of construction equipment. The test for continuation of a nonconforming use is set forth in *McKemy v. Baltimore County*, 39 Md. App. 257, 385 A.2d 96 (1978), a decision relied upon by the hearing examiner and cited by both parties in this Court in support of their respective positions.

In *McKemy* the property had been used, prior to zoning, "for the transient parking of trucks and other vehicles as an adjunct to a restaurant business." *Id.* at 269, 385 A.2d at 103. In 1969 the use changed to "the parking of trucks and other vehicles in conjunction with a fuel oil business." *Id.* This Court held that the zoning authorities should not have assumed "that the lowest common denominator was 'parking,' or even 'parking' in conjunction with a business across the street." *Id.* "[T]hat a parking lot is a parking lot is a parking lot ... is simply not so." *Id.* at 268,

385 A.2d at 102. This Court remanded that phase of the case for consideration by the zoning authority of the following factors:

> "(1) to what extent does the current use of these lots reflect the nature and purpose of the original non-conforming use;
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> "(2) is the current use merely a different manner of utilizing the original non-conforming use or does it constitute a use different in character, nature, and kind;
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> "(3) does the current use have a substantially different effect upon the neighborhood;
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> "(4) is the current use a 'drastic enlargement or extension' of the original non-conforming use."

Id. at 269-70, 385 A.2d at 104.

Of course, "the question ... as to what is an extension or enlargement of a non-conforming use is ordinarily one of fact[.]" *Phillips v. Zoning Comm'r of Howard County*, 225 Md. 102, 109, 169 A.2d 410, 414 (1961). Thus, the operative facts in any given case may be relevant to more than one of the *McKemy* factors.

So long as the Council's determination is supported by substantial evidence, it is not clearly erroneous and will not be disturbed upon review. *Board of County Comm'rs v. Levitt & Sons, Inc.*, 235 Md. 151, 160-61, 200 A.2d 670, 676 (1964). *See also Gigeous v. Eastern Correctional Inst.*, 363 Md. 481, 769 A.2d 912 (2001). Here, the nature of the original nonconforming use was, as found by the examiner, "relatively minor, non-intrusive, and personal." The finding that the pre-existing use was "personal" is particularly significant. In the relevant period from December 1,

1957, to December 1, 1989, only one contracting job by Conklin for compensation--tree clearing for Duvall--is identified in the evidence. The examiner was not clearly erroneous in treating the storage of the operable bulldozer as *de minimis* or incidental to Conklin's agricultural/residential use of the Property. Even if we assume that the Harford County Zoning Ordinance strictly prohibits at the Property the storage of construction equipment that is rarely used for commercial purposes, the nature of Conklin's nonconforming use seems to have been his disposition to acquire broken down equipment in the unfulfilled anticipation of repairing it at some time in the future and not to use it in a full-time excavating contracting business.

Substantial evidence also supports the examiner's conclusion that Dilworth's use was different in character, nature, and kind from that of Conklin. The current use is "an active trucking operation with numerous tandem-axle dump trucks, a variety of associated equipment, [and] a large fenced-in parking area," all of which the examiner found greatly to exceed the Conklin use. The cases finding lawful intensifications of nonconforming uses that are relied upon by Kraus primarily address this factor.

In *Feldstein v. LaVale Zoning Bd.*, *supra*, the Court of Appeals affirmed the trial court's refusal to enjoin the continued operation of a junkyard at which the height of the junk had increased from eight feet to an average of up to twenty-five feet

in the period from enactment of the zoning ordinance to trial. The increase had resulted from a continuation of the original nonconforming use. 246 Md. at 211, 227 A.2d at 734.

In *Jahnigan v. Staley*, the owner of waterfront property rented boat slips on a ninety foot pier for dockage or wet storage and also rented rowboats at the time of the original zoning. In succeeding years the owner built additional, non-accessory piers and increased its inventory of rowboats for rental to as many as sixteen. 245 Md. at 133, 225 A.2d at 279. The additional piers were held to be an unlawful extension because they amounted to "a drastic enlargement" of the prior existing use. *Id.* at 138, 225 A.2d at 282. On the other hand, a restriction to seven of the number of rowboats for hire that had been imposed on the owner was stricken on appeal. The increase in the volume was held to be a permissible intensification of the nonconforming use. In explanation of the latter holding, the Court cited to *Nyburg v. Solmson, supra. Id.*

Nyburg arose under the Baltimore City Zoning Ordinance first enacted in 1931. The nonconforming use was a large garage for the storage, service and repair of automobiles. The building was set back more than 100 feet from the front street. In 1950 the property owner made an arrangement with a group of car dealers under which they could store new cars in the setback area. 205 Md. at 154, 106 A.2d at 484. When neighbors complained, the zoning

board limited to ten the number of vehicles that could be stored at any one time in the setback area. *Id.*, 106 A.2d at 484-85. The circuit court struck down that limitation, and the Court of Appeals affirmed. Increased frequency of use ordinarily is not an extension of the use. *Id.* at 161, 106 A.2d at 488. Further, there was no substantial evidence to support the finding. The Court said:

> "The appellee, and witnesses who supported him, gave testimony which fully warranted a finding that all of the area from 1925 on, at least, had been used for the parking, storing, washing and simonizing of cars and that part had been used for the sale of gasoline from pumps. One witness said that he and thirty or forty other chauffeurs regularly parked their own and their employers' cars on the open area and that this had been going on for thirty years."

Id. at 159, 106 A.2d at 487.

The foregoing cases are factually distinguishable from the instant matter. Here, the vehicles stored by Conklin, as found by the examiner, "were never operable for the entire time they existed on the property, with the exception of the one bulldozer which Mr. Conklin drove around the [P]roperty." That is a substantially different type of storage from that for which Dilworth utilizes the Property.

Just as, in *McKemy, supra*, all parking is not the same, so too, all storage is not the same. *President & Trustees of Village of Ossining v. Meredith*, 275 A.D. 850, 88 N.Y.S.2d 775 (1949), is illustrative. In that case the prior nonconforming use had been

the storage of poles, reels of cable, pipe, and other equipment which were removed, apparently by truck, from time to time from the premises. Subsequently the property was used for the storing or parking of trucks, trailers, and tractors. These vehicles entered and left the premises on a daily basis between 4:00 a.m. and 10:00 p.m. In order to connect a tractor to a trailer, the tractor's motor was raced, creating a very loud noise and vibrations, particularly when two, three, or four tractor engines were raced at the same time. This type of storage was held not to be a continuation of the prior nonconforming use. It is noteworthy that the *Village of Ossining* decision was cited with favor by the Court of Appeals in *Phillips v. Zoning Comm'r, supra*, 225 Md. at 110 n.6, 169 A.2d at 414 n.7, where the Court said that, in *Ossining*, "the Appellate Division overruled a Special Term holding that 'storage was storage' and held that the later use was new and different." *Id.*

The fact that the Dilworth equipment is operable but Conklin's was not impacts the third factor in *McKemy*, namely, the extent of the effect of the change on the surrounding neighborhood. Inoperable equipment does not emit noise or fumes. At the hearing in the matter at hand neighbors complained of the offensive noise emitted by the trucks when their engines were warming up and particularly when their safety alarms were sounding as the vehicles backed up. These noises occurred between 5:30 and 6:00 a.m. when

the equipment was leaving the Property and from 5:00 to 6:00 p.m., discounting stragglers, when the workers returned to the Property. One adjoining neighbor also complained that he was subjected to a blue haze and diesel smells if he drank his morning cup of coffee on the back deck of his house.

Based on all of the evidence the Council concurred in the examiner's proposed finding that the nature of the change was "drastic." We hold that there was substantial evidence to support the Council's findings and that its conclusion was not clearly erroneous.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.